Supreme Court, U.S.
FILED
JAN 7 - 2008
OFFICE OF THE CLERK

79

No. _____ 07-914

In The
Supreme Court of the United States

ICE EMBASSY, INC., *et al.*,

Petitioners,

v.

CITY OF HOUSTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
WESTON, GARROU, DEWITT & WALTERS
12121 Wilshire Boulevard, Suite 900
Los Angeles, CA 90025
(310) 442-0072

Attorneys for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. **"Substantial government interest" issue.** May a city amend its adult zoning restrictions to significantly increase the required distances between adult businesses and "sensitive uses" and thereby close nearly 100 lawful pre-existing businesses, without showing that the increased distances are needed to combat asserted secondary effects not already ameliorated by the original distances? Under *Alameda Books*' "substantial government interest" test, must adult zoning amendments be reasonably believed to be effective in reducing secondary effects existing at the time of enactment – other than by merely *eliminating* such businesses?

2. **"Chilling of expression/Reasonable opportunity" issue.** Even if a city has adequate justification to amend its adult zoning restrictions, may it with each new amendment knowingly and repeatedly terminate the overwhelming majority of adult businesses, most of which opened in reliance on the prior restrictions, without effectively denying such businesses the *reasonable* opportunity to open or relocate guaranteed by the First Amendment?

3. **"Signage" issue.** Does an ordinance limiting the content of on-premises signage for adult entertainment businesses to only the business' name and type (e.g., "adult cabaret"), thus prohibiting even inoffensive truthful information, constitute an impermissible restraint of commercial expression?

RULE 14.1(b) LIST OF PARTIES

Petitioners. The following are the petitioners herein:

> ICE Embassy, Inc., Texas Richmond Corp., SSD Enterprises, Inc., AHD Houston, Inc., D.N.W. Houston, Inc., D. Houston, Inc., D. Rankin, Inc., RCI Entertainment, Inc. (listed in the courts below solely by its dba, XTC North), Trumps, Inc. (listed in the courts below specifically, and also derivatively by references to its various dba's), Verdant Ventures LP (successor in interest to 8503 North Freeway, Inc.), and Gateway Regency LP (successor in interest to 9834 Jensen, Inc.).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners AHD Houston, Inc., D.N.W. Houston, Inc., D. Houston, Inc., D. Rankin, Inc. are wholly owned by D. Texas Investments, Inc., a non-publicly traded company. Petitioners RCI Entertainment, Inc., and Trumps, Inc. are wholly owned by the following publicly traded company: Rick's Cabaret International, Inc.

No other petitioners are owned, wholly or partially, by any other company and, with the exception of petitioners RCI, Inc. and Trumps, Inc., none of the corporate petitioners herein is owned or partially owned by any publicly held company holding 10% or more of its stock.

RULE 14.1(b) LIST OF PARTIES – Continued

Principal Respondent. Respondent City of Houston, a political subdivision of the State of Texas.

Other Respondents. Petitioners believe that the following entities (all of whom were parties in the most recent proceedings in the court of appeals, Fifth Circuit Court of Appeals case no. 07-20329) do *not* intend to participate in any way in the proceedings before this Court:

> **The following plaintiffs represented in the court of appeals by Nelson Hensley:** Studemont Video; Eastex Video; 24 Hour News and Video Emporium; Airline Video and Thai Company; DHR, Inc.; Sugar's Cabaret; Chil Soung Inc. (doing business as BJ's 24 Hour Newsstand); Daris Inc. (doing business as Riveria Cabaret); GNCD, Inc. (doing business as Fantasy South); Rude Dog II, Inc. (doing business as Scores Cabaret); Lone Starr Multi Theatres Inc. (doing business as Cinema West); AVW, Inc. (doing business as Adult Video Megaplexxx); CLMS, Inc. (doing business as 24 Hour Video & News); Long Tran (doing business as Ellington Newsstand); Nien X Nguyen (doing business as DT Video); AKM, Inc. (doing business as Gigi's Cabaret); DHR, Inc. (doing business as Hi-10 Cabaret); Panah, Inc. (doing business as Mirage Cabaret); R&R Entertainment, Inc. (doing business as Moments Cabaret); HHE, Inc. (doing business as Passion Cabaret); Houman Shaghagi (doing

RULE 14.1(b) LIST OF PARTIES – Continued

business as Foxxy's Cabaret); Southeast Texas Ventures, a Texas joint venture (*formerly* doing business as the Trophy Club); KMRC, Inc. (doing business as Lachatte); Aris Mylonas (doing business as Baby Dolls Saloon); M K Club & Restaurants, Inc. (doing business as Moulin Rouge); 10128 TDC 1, Inc. (doing business as Texas Dolls Cabaret); Obsession Cabaret, Inc., Gino A Barone (doing business as Ban Management Company, doing business as Telephone Road News & Video, also known as Consolidated Video, doing business as Hillcroft News & Video); Andrew Sefia and others similarly situated (doing business as Rumors); and Rick's Sports Cabaret.

The following plaintiffs represented in the court of appeals by Joe Grant: W.L. York, Inc. (doing business as Cover Girls), and D.W.G. FM, Inc. (dba Splendor).

The following plaintiff represented in the court of appeals by Albert T. Van Huff: 6340 Westheimer, Inc. (doing business as All Stars), successor in interest to plaintiff Aris Mylonas (formerly doing business as Baby Dolls Saloon).

The following plaintiff represented in the court of appeals by Weston, Garrou, DeWitt & Walters: HFR Enterprises, Inc.

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	x
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS	4
STATEMENT OF THE CASE	4
Jurisdiction Below	4
Relevant Background	5
The 1997 Ordinance	7
Impact on Petitioners	9
The 1998 district court summary judgment ruling	10
The initial court of appeals ruling	12
The first certiorari petition	15
The trial court proceedings on the scope of the remand	15
The trial court's post-trial rulings	16
The court of appeals proceedings on review of the final judgment below	16

TABLE OF CONTENTS – Continued

Page

REASONS FOR GRANTING THE WRIT 19

I. A substantial conflict exists between the Fifth Circuit's published decision below, and this Court's decisions in *Alameda Books* and *Barnes v. Glen Theatre,* highlighting the need for guidance to the numerous lower courts attempting to apply the "substantial government interest" test to adult business regulations. 21

II. Conflicting with the First Amendment principles this Court recognized in both *Alameda Books* and *Renton*, the Fifth Circuit's decision guarantees significant damage to petitioners' and *the public's* First Amendment rights in Houston, and threatens the public's rights throughout the country if the practice of repeated amending of adult zoning ordinances to eliminate most adult businesses is allowed to stand..... 27

III. The Fifth Circuit's decision below stands alone in direct conflict with published decisions of the Seventh and Eighth Circuits and the Georgia Supreme Court, regarding the validity of severe restrictions on the content of signs for adult businesses 31

CONCLUSION..... 34

TABLE OF CONTENTS – Continued

Page

APPENDICES

VOLUME I

Appendix A – Fifth Circuit Court of Appeals Opinion (August 20, 2007)....App. 1

Appendix B – Fifth Circuit Court of Appeals Order denying as moot, unopposed motion to file supplemental brief (August 20, 2007)...App. 5

Appendix C – District Court Letter transmitting completed record on appeal to Court of Appeals (120 volumes) (July 19, 2007).....App. 8

Appendix D – District Court Letter to Counsel containing CD of electronic record on appeal (July 16, 2007).....App. 10

Appendix E – Fifth Circuit Court of Appeals Letter to Counsel establishing briefing schedule (July 10, 2007) .....App. 11

Appendix F – Fifth Circuit Court of Appeals ruling denying motion to reschedule setting of expedited oral argument (July 2, 2007).....App. 13

Appendix G – Fifth Circuit Court of Appeals ruling ordering, *inter alia*, expedited briefing (May 25, 2007).....App. 16

Appendix H – District Court Findings of Fact and Conclusions of Law (January 31, 2007).....App. 20

Appendix I – District Court Final Judgment (January 31, 2007).....App. 66

TABLE OF CONTENTS – Continued

Page

Appendix J – District Court Order denying motion for reconsideration of the Order of May 10, 2005 (July 20, 2005)..... App. 67

Appendix K – District Court Order regarding limited issues remaining for litigation on remand (May 10, 2005)..... App. 71

Appendix L – Fifth Circuit Court of Appeals Opinion (November 25, 2003)..... App. 77

VOLUME II

Appendix M – District Court Amended Memorandum Opinion and Order of June 9, 1998 [Amending Opinion of February 18, 1998].... App. 149

VOLUME III

Appendix N – District Court's Order of Final Judgment of August 31, 1998..... App. 425

Appendix O – District Court's Order of Severance of August 28, 1998..... App. 427

Appendix P – District Court Supplemental Memorandum Opinion and Order of June 11, 1998 [Initial Decision on Reconsideration] ... App. 428

Appendix Q – District Court Memorandum and Order of March 29, 2007 (Portion Denying Motion to Alter or Amend Judgment)..... App. 583

Appendix R – Fifth Circuit Court of Appeals Order Denying Rehearing en banc (October 3, 2007)..... App. 593

TABLE OF CONTENTS – Continued

Page

Appendix S – Pertinent Portions of Houston Ordinance No. 97-75 ..... App. 597

Appendix T – Pertinent Portions of Houston Ordinance No. 86-323 ..... App. 625

Appendix U – Petitioners' Statement of Issues (as set forth within their Corrected Opening Brief filed in the Fifth Circuit Court of Appeals on July 25, 2007) ..... App. 644

TABLE OF AUTHORITIES

Page

FEDERAL CASES

SUPREME COURT

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 33

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 21, 23

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,
447 U.S. 557 (1980) 32, 33

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 33

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) ..... *passim*

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) ..... *passim*

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990) 23

Greater New Orleans Broadcasting Ass'n, Inc. v. United States,
527 U.S. 173 (1999) 33

Hamilton Shoe Co. v. Wolf Brothers,
240 U.S. 251 (1916) 2

Hanover Shoe, Inc. v. United Shoe Machinery Corp.,
392 U.S. 481 (1968) 2

Ice Embassy, Inc., et al. v. City of Houston,
543 U.S. 958 (2004) 15

TABLE OF AUTHORITIES – Continued

Page

Major League Baseball Players Ass'n v. Garvey,
532 U.S. 504 (2001) 2

Marks v. United States,
430 U.S. 188 (1977) 24

Mercer v. Theriot,
377 U.S. 152 (1964) 2

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 33

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 19

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 32

Young v. American Mini Theatres,
427 U.S. 50 (1976) 19, 30

COURTS OF APPEALS

Abilene Retail v. Dickenson County,
492 F.3d 1164 (10th Cir. 2007) 27

Ice Embassy, Inc. v. City of Houston,
236 Fed.Appx. 118 (5th Cir. 2007)
(unpublished) 2

MD II Entertainment, Inc. v. City of Dallas,
28 F.3d 492 (5th Cir. 1994) 32

N.W. Enterprises, Inc. v. City of Houston,
352 F.3d 162 (5th Cir. 2003) 2, 24, 25

Passions Video, Inc. v. Nixon,
458 F.3d 837 (8th Cir. 2006) 32

TABLE OF AUTHORITIES – Continued

Page

Pleasureland Museum, Inc. v. Beutter,
288 F.3d 988 (7th Cir. 2002) 31

SDJ, Inc. v. City of Houston,
837 F.2d 1268 (5th Cir. 1988) .....*passim*

DISTRICT COURTS

N.W. Enterprises, Inc. v. City of Houston,
27 F.Supp.2d 754 (S.D. Tex. 1998).....2

STATE CASES

State v. Cafe Erotica,
270 Ga. 97, 507 S.E.2d 732 (1998) 32

CONSTITUTIONAL PROVISIONS

United States Constitution:

First Amendment .....*passim*

FEDERAL STATUTES

28 U.S.C. § 1254(1).....3

28 U.S.C. § 1331 5

28 U.S.C. § 1343(a)(3).....5

ORDINANCES

Houston Ordinance No. 86-323.....4

Houston Ordinance No. 97-75.....4

TABLE OF AUTHORITIES – Continued

Page

Houston Code of Ordinances:

§ 28-121 6

§ 28-125(b)(1) 5, 7, 9

§ 28-125(b)(2) 5

§ 28-125(b)(3) 5, 7, 9, 10

§ 28-125(c) 8

§ 28-130 6

§ 28-130(c) 31

§ 28-130(f) 31

MISCELLANEOUS AUTHORITY

Stern & Gressman, *Supreme Court Practice* (8th ed.) 2

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the decisions of the United States Court of Appeals for the Fifth Circuit rendered herein on August 20, 2007 and November 25, 2003.

Following ten years of litigation, this petition presents important constitutional questions involving the validity of adult zoning and signage restrictions. The questions presented herein arise primarily from a published interlocutory court of appeals decision, the first of two court of appeals opinions in this case. (The second is an unpublished per curiam opinion summarily affirming the judgment of the trial court on remand with respect to issues which, for the *most part*, are not relevant to this petition.[1])

Notwithstanding this Court's previous denial of certiorari after the initial interlocutory court of appeals decision, the issues arising from that initial published decision of the court of appeals (as well as any arising tangentially from the court of appeals'

---

[1] However, the proceedings on remand provide the Court with a non-speculative, final interpretation of the meaning of important aspects of the Fifth Circuit's original published decision resolving the "substantial government interest" issue which is at the heart of this petition.

subsequent unpublished summary disposition) are now properly before this Court for review.[2]

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, rendered August 20, 2007, is unpublished, but reported as *Ice Embassy, Inc. v. City of Houston*, 236 Fed.Appx. 118 (5th Cir. 2007) (App. 1[3]). The unreported order of that court denying a Petition For Rehearing is found at App. 593. The initial published opinion of the court of appeals is reported as *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) (App. 77).

The two relevant published opinions of the United States District Court for the Southern District of Texas rendered prior to the initial appeal are both reported as *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998), and consist of its

---

[2] This Court's review of all earlier court of appeals opinions is proper once a final judgment is rendered below, even if this Court previously denied review sought at the time of an earlier interlocutory ruling. *See Supreme Court Practice*, Stern & Gressman, 8th Edition, pp. 73-75. *See also, Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-258 (1916), *Mercer v. Theriot*, 377 U.S. 152, 153-154 (1964), *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488, n.6 (1968), and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508, n.1 (2001).

[3] The term "App." is used herein as a reference to the Appendix to this petition.

Memorandum Opinion and Order of February 18, 1998, as amended June 9, 1998 (App. 149), and its Supplemental Memorandum Opinion and Order of June 11, 1998 (App. 428).

The district court's relevant post-remand rulings pertinent to this petition are all unpublished: Order of May 10, 2005, regarding limited issues remaining for litigation on remand (App. 71); Order of July 20, 2005, denying motion for reconsideration of order of May 10, 2005 (App. 67); Findings of Fact and Conclusions of Law rendered January 31, 2007 (App. 20); and Memorandum and Order of March 29, 2007, to the extent it denied petitioners' motion to alter or amend the judgment (App. 583).

JURISDICTION

The court of appeals' most recent decision was entered on August 20, 2007 (App. 1). A timely petition for rehearing was denied on October 3, 2007 (App. 593). This Court granted a six-day extension of the certiorari filing deadline, until January 7, 2008, in an order dated December 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves facial constitutional challenges to portions of Houston Ordinance 97-75 ("the Ordinance" or "the 1997 ordinance"), reproduced in relevant part beginning at App. 597. The only other ordinance relevant to this petition is Houston Ordinance 86-323 ("the 1986 ordinance"), a predecessor to the 1997 ordinance challenged in this petition; its relevant portions are reproduced at App. 625. Both ordinances amended Chapter 28 of the Houston Code of Ordinances ("H.C.O.") regulating adult businesses.[4]

The applicable text of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

STATEMENT OF THE CASE

Jurisdiction Below

This petition arises from a civil rights action brought in the United States District Court for the Southern District of Texas challenging the constitutionality of Houston's 1997 adult business ordinance.

[4] The Ordinance actually uses the term "Sexually Oriented Businesses" rather than "adult businesses." Because of the pejorative implications of that acronym (which were almost certainly intended by its drafters), petitioners will, throughout, substitute either the term "adult businesses," "AEBs" or "adult entertainment businesses."

The district court's jurisdiction was properly based on 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343(a)(3) (jurisdiction over federal civil rights actions).

Relevant Background

Houston planted the seeds of the present dispute in 1983 and 1986 when it amended the adult business provisions of its Code of Ordinances to, *inter alia*, significantly restrict the permissible locations for adult entertainment businesses.[5] The 1986 ordinance imposed a variety of locational restrictions on adult entertainment businesses[6] and further required that

---

[5] The 1983 and 1986 ordinances contained almost identical locational restrictions (except that the 1986 ordinance added licensed day care centers as a new sensitive use). The 1986 ordinance also added alcohol-serving adult businesses to the original adult businesses *subject* to the locational restrictions. For simplicity, the sole reference hereafter to the prior ordinances shall be to the 1986 ordinance.

[6] These included:

(1) No adult business may be "located within 750 feet of any school, church or licensed day-care center." H.C.O. § 28-125(b)(1).

(2) No adult business may be located within 1,000 feet of any other licensed adult business. H.C.O. § 28-125(b)(2).

(3) Adult businesses were prohibited from operating on any "tract" of land for which 75% or more of the "tracts" within a 1,000 foot radius were residential. H.C.O. § 28-125(b)(3).

(Continued on following page)

any lawfully pre-existing adult businesses not in compliance with the new locational restrictions terminate less than nine months after the enactment date (App. 643).

The 1986 ordinance also imposed significant restrictions on the content of on-premises signage of adult businesses. (*See* H.C.O. § 28-130, as amended 1986; App. 639.)

In a civil action ultimately resolved in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), 23 of the then-existing lawfully located adult businesses in Houston asserted that these various separation requirements and signage restrictions violated the First Amendment.[7] The court of appeals in *SDJ* upheld all the challenged restrictions and these businesses were then subject to the ordinance's mandatory termination provision.

---

(4) The term "tract" was defined (in § 28-121) as: "A contiguous parcel of land under common ownership, whether situated within the City or not."

[7] The *SDJ* action was initiated by the owners of 23 topless bars forced to move by the 1986 ordinance. 837 F.2d at 1271. Petitioners believe that these 23 businesses constituted the overwhelming majority of such businesses then lawfully established in Houston, but petitioners were denied discovery below when they sought to determine that fact. The City successfully opposed this discovery on the asserted ground that this information was not relevant to resolution of petitioners' constitutional claims.

The 1997 Ordinance

In January, 1997, the City again amended its locational restrictions. (The 1997 ordinance, App. 597.) It did so knowing that the Ordinance would eliminate the overwhelming majority of existing adult businesses (most of which had been established in reliance on the locational restrictions upheld in *SDJ*).[8]

Petitioners' businesses were AEBs already lawfully licensed and operating when the City enacted the 1997 ordinance, and were required by that ordinance to terminate. Most, if not all, of these businesses were established *after* and in reliance upon the 1986 ordinance.

The 1997 ordinance amended the locational restrictions in the following ways:

> (1) It increased mandatory separations between adult businesses and existing sensitive uses, e.g., "any school, church or licensed day-care center," from 750 feet to 1,500 feet; and added "public parks" as a new sensitive use (App. 611).
>
> (2) It increased the radius of § 28-125(b)(3)'s "residential density" circle from 1,000 feet to 1,500 feet (App. 612).

---

[8] Based on its own study, the City Council concluded that the ordinance would eliminate 95 adult businesses (App. 32). At the time of enactment of the ordinance, there were 101 licensed adult businesses in Houston. *Id.*

(3) It also amended that same residential proximity restriction by adding a new provision more heavily weighting "multifamily tracts" in the calculation of the number of residential tracts within any given circle (App. 612-613).

(4) It modified the ordinance's definition of "residential" to count unimproved tracts as "residential" if the Harris County Appraisal District had designated them as "residential" for tax appraisal purposes or if the Planning Official's records designated the "tract" as having been platted or subdivided for eventual residential use (App. 606-607).

(5) It required the termination, within 180 days, of all pre-existing, lawfully located adult businesses that did not conform with its expanded restrictions (App. 617 and 613).

(6) It required that the determination of whether a previously licensed adult business is rendered non-conforming by a proximate sensitive use is to be based on whether the sensitive use existed on the date of enactment of the 1997 ordinance, rather than on the date the adult business originally obtained its license.[9]

---

[9] *See* H.C.O. § 28-125(c) (App. 613) and constructions of that provision by the district court, both initially (see nn.49 and 54 at App. 498 and 504) and in its rulings on remand refusing to reconsider its earlier ruling (App. 75 and 68).

While the City Council had before it a legislative record regarding the general proposition that adult businesses have adverse secondary effects, it had no evidence before it of any need to *expand* the distances of the existing 1986 separation requirements or that those prior distances were inadequate to ameliorate any such secondary effects.[10]

Impact on Petitioners

Petitioners' businesses, as well as the overwhelming majority of *all* adult oriented businesses in Houston, were rendered non-conforming by the 1997 amendments.[11] While most of petitioners' businesses (and those of other plaintiffs below) were rendered non-conforming solely by the expansions of the ordinance's sensitive use and residential circle buffer distances from 750 and 1,000 feet to 1,500 feet,[12] the businesses of some plaintiffs below, including those of one or more petitioners, were also rendered non-conforming by amendments in the 1997 ordinance

---

[10] As noted *infra*, the district court expressly so found in its 1998 summary judgment opinion.

[11] *See* n.8, *supra*. Also, at the time the 1997 ordinance was enacted, petitioners' businesses had adult business licenses. Petitioners thereafter sought renewal of their licenses (which the City treated as "new" rather than "renewal" license applications), and were then denied based on the 1997 amendment of the Ordinance's various locational provisions.

[12] *See* H.C.O. § 28-125(b)(1) and (3) (App. 611-612).

other than those expanding the buffer distances.[13] Consequently, even if this Court were to provide relief under Question One, some petitioners would still need the relief sought under Question Two.

Finally, the record reflects that at least two of the petitioners have signs which would violate the Ordinance's challenged signage restrictions.

The 1998 district court summary judgment ruling

In summary judgment proceedings in 1998,[14] the district court found unconstitutional the City's expansion of the required separation distances from sensitive uses. It found that the City had absolutely no

---

[13] E.g., one or more petitioners were potentially rendered non-conforming by the 1997 amendment of H.C.O. § 28-125(b)(3) to more heavily weight "multifamily tracts" when determining the percentage of residential "tracts" within a specified distance around an adult site, and/or by the requirement that the existence of disqualifying sensitive uses proximate to adult businesses be determined as they existed on the date of the new ordinance's enactment, rather than on the date of original licensure of such businesses.

[14] The district court issued its summary judgment rulings initially on February 18, 1998, and thereafter allowed the parties to file any new motions or amended pleadings, if necessary, to address any issues created as a result of its February rulings. Then, on June 9, 1998, it reissued a slightly amended and superseding version of its original opinion of February 18, 1998 (App. 149). Two days later, on June 11, 1998, it issued an opinion (App. 428) addressing all the issues the parties had raised in *response* to its February 18, 1998, ruling.

evidence justifying the expansion of the existing separation distances.[15] However, the court rejected petitioners' more global challenges asserting that *all* the new 1997 changes were invalid as applied to pre-existing businesses[16] (App. 489-494).

The district court also upheld (against "substantial government interest" challenges) the City's addition of both a "park" as a new sensitive use and a new provision more heavily weighting multi-unit dwellings for purposes of calculating the density of the ordinance's "residential circle" (App. 293, 298). The court also upheld the ordinance's signage restrictions based on the perceived controlling decision in *SDJ* (App. 343-346).

---

[15] Generally, *see* App. 253-273, 286. For example, the court stated:

> "[T]he City's decision to expand the distance requirements in the ordinance's locational provisions was not based on any evidence of secondary effects that specifically justify these increases." (App. 253).

[16] Primary among these "global" challenges was the principle asserted in Question Two, i.e., that allowing cities repeatedly to change the rules for location of adult businesses, and repeatedly use the changed rules to eliminate all uses made non-conforming, has an impermissible chilling effect on expression because no reasonable business person, aware of a city's proclivity to periodically eliminate nearly all its adult businesses, would invest in a new location. Plaintiffs argued, in essence, that allowing the City to apply the amended restrictions to pre-existing lawful uses would deny plaintiffs a "reasonable" opportunity to relocate regardless of the number of "relocation" sites to which a city may point with each new amendment.

In its Supplemental Opinion and Order of June 11, 1998 (App. 428), the district court also rejected a challenge brought by some plaintiffs (including at least one petitioner) asserting that the City could apply new ordinance provisions to pre-existing businesses only if the application of those new provisions was based on *the facts as they existed at the time those businesses were first licensed*, rather than when the new provisions were adopted.[17]

Finally, the district court noted that petitioners' remaining challenges to the locational provisions (e.g., the "multi-family dwelling" provision and the provision adding "public parks" as a protected sensitive use category), could not be fully resolved until the parties had litigated whether the Ordinance, in its *entirety*, allowed an adequate number of alternative relocation sites for adult businesses. The court then severed the "alternative sites" issue and certified the balance of its rulings as a final appealable judgment.

The initial court of appeals ruling

In its initial consideration of this case, the court of appeals specifically addressed most (though not all)

---

[17] These plaintiffs asserted that it violated the First Amendment to apply new restrictions against previously licensed adult businesses where the only basis for potential disqualification would be a private sensitive use that had been established near an already existing, licensed adult business.

of the petitioners' challenges to the locational restrictions.[18] It essentially affirmed all rulings adverse to petitioners and reversed all rulings favorable to petitioners.

Specifically, the court expressly rejected the challenge to successive mass forced closures (denominated below as the "shell game" argument), concluding that it was inconsistent with this Court's decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (App. 98-99).

The court of appeals also expressly rejected petitioners' constitutional challenges to the City's signage restrictions based on its prior *SDJ* opinion[19] (App. 125).

---

[18] Of the currently relevant aspects of its opinion, the only issue addressed by the district court *not* addressed by the court of appeals was its decision allowing application of amended locational restrictions to previously licensed businesses based upon the facts as they existed at the time of the amendment rather than as they existed at the time of the adult business' initial licensure.

[19] The court of appeals indicated that the signage restrictions, while valid, could not be enforced until the City complied with a state law requirement to appoint a sign board to administer enforcement efforts (App. 121-125). Nonetheless, because the court of appeals then reached the merits of these petitioners' constitutional challenges to these restrictions and squarely rejected them, and made no suggestion that petitioners lacked standing to raise these challenges (App. 125), those rulings would collaterally estop petitioners in any enforcement proceeding that may hereafter be brought against them. For that

(Continued on following page)

Most significantly, the court of appeals reversed the district court's holding finding unconstitutional the City's expansion of its sensitive use separation provision from 750 feet to 1,500 feet and its "residential circle" provision from 1,000 feet to 1,500 feet. It concluded that the summary judgment record before the district court, consisting of only the legislative record – the district court having precluded all other discovery on the issue of justification – was sufficient to sustain the City's slight initial burden under *Alameda Books* to demonstrate adequate justification for the expansions.

Essentially, the court of appeals reasoned that the evidence in the legislative record allowed the City Council to conclude that adult businesses generally have adverse secondary effects. It concluded that no more was required in order to sustain the Ordinance (*see* App. 106-108).

During the brief-writing phase of the appeal, this Court decided *Alameda Books*. Invoking the *Alameda Books* plurality opinion, petitioners' briefing requested that if the court of appeals found Houston's *prima facie* showing of justification sufficient to survive summary judgment, it should extend petitioners, on remand, the same opportunity to attempt to present evidence challenging that *prima facie*

---

reason, this petition represents their last opportunity to challenge the Fifth Circuit's constitutional rulings. (For a more complete description of these challenges, *see* the district court's opinion, App. 336-341.)

showing as this Court afforded the *Alameda Books* plaintiffs on their remand.

The court of appeals did not specifically address this request but essentially stated that the *only* issue that plaintiffs would be allowed to litigate on remand was whether the Ordinance provided a sufficient number of alternative sites for the relocation of their businesses (App. 102, 108 and 112).[20]

The first certiorari petition

Petitioners subsequently filed a Petition for Writ of Certiorari, which this Court denied. (*Ice Embassy, Inc., et al. v. City of Houston*, 543 U.S. 958 (2004); Docket no. 004-292.)

The trial court proceedings on the scope of the remand

Following remand, the trial court allowed the parties to brief the issues they believed remained to be resolved. The City asserted that the *only* remaining issue was that of alternative sites. Petitioners argued that, in addition to the alternative sites issue, the parties should be allowed to litigate whether the City had sufficient justification for the expanded separation requirements, requesting permission to

---

[20] Likewise, *see* App. 71-72, where the district court so construed the Fifth Circuit's remand over plaintiffs' protests to the contrary.

put on the type of evidentiary showing expressly approved in *Alameda Books* by both the plurality and Justice Kennedy. Petitioners noted that the decision in *Alameda Books* creating this right came after petitioners' 1998 summary judgment proceedings, and that they should be entitled to the same benefits on remand as were the *Alameda Books* plaintiffs.

The district court ruled that the *only* issue it would allow to be litigated on remand was that of "alternative sites," and that there could be no more litigation of the "substantial government interest" issue (App. 72 and 68-69).

Following substantial additional discovery limited to the alternative sites issue, a two-week bench trial on the "alternative sites" issue ensued.

The trial court's post-trial rulings

Following trial, the court concluded that the ordinance provided sufficient "alternative sites" to satisfy constitutional requirements and upheld the Ordinance. Petitioners do not challenge the "alternative sites" ruling in this petition.

The court of appeals proceedings on review of the final judgment below

On May 20, 2007, a panel of the court of appeals issued an order granting petitioners' motion to stay enforcement of the Ordinance pending that court's disposition of the merits of the appeal. The order also,

sua sponte, set the case for an expedited oral argument, though without establishing a specific briefing schedule (App. 16-19).

On July 2, 2007, the court of appeals denied petitioners' motion to reschedule the expedited oral argument date (so as to permit additional time for briefing) (App. 13). Petitioners sought that relief in connection with their appeal following ten years of litigation and a two week trial, because of the size of the record, the unusually large number of parties, issues and exhibits, and the fact that the record on appeal had not yet been prepared (presumably due to its unusual length, 891 docket entries).[21]

On July 10, 2007, the court of appeals issued its briefing schedule, requiring appellants' brief and record excerpts to be filed by July 18, 2007 (App. 11). At this point, the district court record had still not been prepared.

The district court clerk's office first made available a readable copy of the record on July 17, 2007.[22]

---

[21] The number and complexity of the issues confronting petitioners on the second appeal are illustrated by the trial court's 40 page Findings of Fact and Conclusions of Law (App. 20) and its rulings on their Motion to Alter or Amend the Judgment (App. 583), although none of those issues is raised in this petition.

[22] On July 16, 2007, the clerk's office sent a notice to counsel announcing its completion of the record (App. 10), but the CD it prepared was defective and a readable one was not created until the following day.

It certified the record on appeal two days later (App. 8, 10). However, as required by the court's earlier ruling, petitioners timely filed their Opening Brief and Record Excerpts on July 18, 2007.

On appeal, petitioners challenged, *inter alia*, the ruling below prohibiting them from attempting to challenge the City's *prima facie* showing of a substantial government interest under the new standards announced in *Alameda Books*.

Petitioners timely filed their Reply Brief in the court of appeals on July 30, 2007, and oral argument occurred eight days later. On August 17, 2007, petitioners filed a motion for leave to submit a supplemental brief, a copy of which accompanied the motion. Petitioners explained that they needed to submit this brief to address points which had been discussed in oral argument but which they had not been able to brief previously because of the expedited briefing schedule. On August 20, 2007, the court of appeals denied the motion as moot and simultaneously issued its final judgment in this case, a one-paragraph, unpublished, *per curiam*, summary disposition, stating:

> "Certain SOBs appealed and we heard oral argument. We now AFFIRM the district court's finding, essentially for the reasons articulated by the district court in its opinion below."

REASONS FOR GRANTING THE WRIT

The enormity of the impact on expression in this case distinguishes it not only from every zoning-related adult business case *this* Court has decided,[23] but from every other such case decided at *any* level. Without any showing of need to modify its prior zoning scheme, Houston expanded its existing adult zoning restrictions so as to knowingly eliminate 95 out of an existing 101 licensed adult businesses (after a prior ordinance also eliminated large numbers of lawful pre-existing adult businesses).

This Court's review is urgently needed not only because this case involves the greatest potential harm to expression ever to have emanated from adult zoning legislation, but also to provide much needed guidance to the lower courts regarding this Court's prior adult zoning decisions. The sheer number of lower court decisions interpreting the practical ramifications of this Court's adult zoning decisions – often with conflicting results – is striking.[24]

Alameda Books, this Court's most recent adult zoning decision, has been the subject of particular uncertainty and confusion in the lower courts, because

---

[23] *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

[24] Westlaw indicates 993 cases citing to *Young*, 659 citing to *Schad*, 1,047 citing to *Renton*, and 173 citing to *Alameda Books*.

it lacked a majority opinion.[25] At least 26 prior certiorari petitions have been filed in this Court seeking clarification of the doctrines that emerge from that decision, including four specifically seeking clarification of Justice Kennedy's concurrence,[26] eighteen seeking clarification of the proper application of the plurality's new "burden shifting" paradigm for analysis of secondary effects evidence,[27] and five others.[28]

---

[25] A current Westlaw search also reveals 227 *secondary* sources citing to *Alameda Books*.

[26] *Deja Vu of Cincinnati, LLC v. Union Township Board of Trustees,* Docket # 05-374; *Gammoh v. City of La Habra,* Docket # 05-30; *Ice Embassy, Inc. v. City of Houston,* Docket # 04-292; *Center for Fair Public Policy v. Maricopa County,* Docket # 03-1107.

[27] *Daytona Grand, Inc. v. City of Daytona Beach,* Docket # 07-768; *Reliable Consultants, Inc. v. City of Kennedale,* Docket # 06-1702; *Jameson v. Commonwealth of Kentucky,* Docket # 06-1697; *Pooh Bah Enterprises, Inc. v. City of Chicago,* Docket # 06-1614; *P.M. Realty and Investments, Inc. v. City of Tampa,* Docket # 06-1161; *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville,* Docket # 06-1078; *Heideman v. South Salt Lake City,* Docket # 05-1551; *XLP Corporation v. County of Lake,* Docket # 05-1113; *Gammoh v. City of La Habra,* Docket # 05-30; *Dahl v. City of Fridley,* Docket # 04-375; *Koziara v. Seminole County,* Docket # 04-186; *McKee v. City of Casselberry,* Docket # 04-177; *GM Enterprises, Inc. v. Town of St. Joseph,* Docket # 03-1549; *Artistic Entertainment, Inc. v. City of Warner Robins,* Docket # 03-1089; *Frandsen v. Brevard County,* Docket # 03-1109; *Manatee County v. Peek-A-Boo Lounge of Bradenton, Inc.,* Docket # 03-1011; *City of San Antonio v. Encore Videos, Inc.,* Docket # 03-163; and *LLEH, Inc. v. Wichita County*, Docket # 02-430.

[28] *Miller v. Conchatta, Inc.,* Docket # 06-844; *Huffman v. Michigan,* Docket # 05-1449; *United Seniors Association, Inc. v.*

(Continued on following page)

The present case provides an exceptional vehicle for resolving the issues left unresolved by the split decision in *Alameda Books*, including whether the First Amendment requires a legislative body to have at least a reasonable basis to believe that the *effect* of any amendments to its adult zoning scheme will be to reduce secondary effects.

I. A substantial conflict exists between the Fifth Circuit's published decision below, and this Court's decisions in *Alameda Books* and *Barnes v. Glen Theatre*, highlighting the need for guidance to the numerous lower courts attempting to apply the "substantial government interest" test to adult business regulations.

Question One presents an issue that has been the subject of great division and confusion in the lower courts, regarding whether a challenged adult zoning law serves a "substantial government interest." This Question raises issues of both *procedure* (resolved below in apparent direct conflict with this Court's decision in *Alameda Books*), and *substance* (with respect to what must be shown when amendments to existing adult business restrictions eliminate

---

Social Security Administration, Docket # 05-929; *The Garter Belt, Inc. v. Charter Township of Van Buren*, Docket # 04-426; and *City of Federal Heights, Colorado v. Essence, Inc.*, Docket # 02-66.

businesses established in conformity with prior adult zoning restrictions).

A. The substantive issue

Here, Houston has knowingly eliminated almost all existing adult businesses by amending its regulations to increase the required distances between adult businesses and residential and other "sensitive uses," with *no* evidence that those existing separation distances failed to ameliorate the secondary effects attributed to adult businesses.

The court of appeals presumed that adult zoning restrictions could be repeatedly expanded, and then applied each time to eliminate the majority of pre-existing licensed businesses based on nothing more than evidence supporting the general proposition that adult businesses generate secondary effects. However, as the district court expressly found in the initial summary judgment proceedings, the City had *no* evidence that showed any secondary effects beyond the original distances or any need for expansion of the original separation distances.[29]

The First Amendment ramifications are startling. If cities are not required to rely on evidence of a *current need* to amend existing adult zoning

---

[29] *See* n.15, *supra*.

restrictions,[30] and particularly when enacting laws which will eliminate most lawful pre-existing uses, then all *meaningful* First Amendment protection for such businesses will be lost.[31] If no showing of current need is required, then cities, at their whim, may repeatedly change their ordinances with impunity, until no business owners will remain who are willing (and foolish enough) to try to relocate and start over.

This aspect of the ruling below is likely the most significant constitutional issue regarding adult business restrictions to be presented to this Court since *Renton*. Review is essential to prevent not only the elimination of the overwhelming majority of previously licensed adult businesses in one major American city, but also the inevitable "copycat" effect which will occur if the Fifth Circuit's opinion becomes final.

---

[30] Indeed, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991), Justice Souter, whose vote was necessary to produce a judgment, stated in his separate concurrence that the "appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a *current* governmental interest in the service of which the challenged application of the statute may be constitutional." (Emphasis added.)

[31] If businesses may be repeatedly forced out of operation and chilled from attempting to relocate, availability of the many other First Amendment protections for such business recognized by this Court, e.g., the prohibition on prior restraints (*FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990)), and the requirement of proof of an adequate number of relocation sites (*Renton*), etc., will be essentially moot points.

Review is also essential to clarify whether the First Amendment requires a legislative body to have a reasonable basis for concluding that such a law will *effectively* reduce secondary effects. In *Alameda Books*, Justice Kennedy stated in his necessary concurrence,[32] that "[t]he purpose *and effect* of a zoning ordinance must be to reduce secondary effects." 535 U.S. at 445 (emphasis added). A similar position was implicitly (if not explicitly) taken by the four *Alameda Books* dissenters.[33] In sharp contrast, the court of appeals squarely *rejected* any First Amendment requirement that a city must have a reasonable basis to believe that an adult zoning amendment would be *effective* in combating secondary effects.[34]

---

[32] Justice Kennedy's concurring opinion in *Alameda Books* provided the necessary fifth vote for a judgment and was the narrowest vote concurring in that judgment. Consequently, under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), it presumably constitutes the holding of the Court in that case.

[33] *See* 535 U.S. at 461-464 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.).

[34] *See* the following passages from the court of appeals' opinion:

> "[N]either the Supreme Court nor this Court require[s] proof of the *efficacy* of an ordinance in order to determine the constitutional review standard." *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d at 174 (App. 92) (emphasis added).
>
> "*SDJ* applied across-the-board intermediate scrutiny to Houston's ordinance without proof of *efficacy* under

(Continued on following page)

Under what appears to be the view of a majority of the Justices in *Alameda Books*, a city council must have a reasonable basis for concluding, at a minimum, that the likely "effect" of a zoning ordinance will be to reduce secondary effects. When Houston increased its pre-existing separation distances, it had no evidence before it to indicate that there were any secondary effects occurring beyond the original separation distances.[35]

Consequently, the court of appeals' ruling appears to sharply conflict with the position of a majority of this Court in *Alameda Books*. Review should be granted to clarify whether the First Amendment requires that the legislative record provide at least a "reasonable" basis for the belief that amendments expanding adult zoning ordinances will be effective in

---

> *Renton's* second prong." *Id.* at 175, n.5 (App. 93) (emphasis added).

The panel then reaffirmed *SDJ's* validity on this point notwithstanding this Court's intervening decision in *Alameda Books*.

> "To require the legislature to show evidence of negative secondary effects and of the new regulation's *efficacy* requires too much of the City at this stage of the inquiry. Disputes over the effectiveness of the proposed regulations are properly reserved for the final prong of the *Renton* analysis." 352 F.3d at 175 (App. 94) (emphasis added).

Both the district court on remand and, implicitly, the court of appeals in the second appeal, concluded that the "final prong" referred to by Judge Jones in the language above was simply the "reasonable alternative sites" prong.

[35] *See* n.15, *supra*.

reducing secondary effects other than by the mere *elimination* of adult businesses.[36]

B. The procedural issue

In *Alameda Books*, both the plurality and Justice Kennedy expressly noted that, on remand, the *Alameda Books* plaintiffs would have the opportunity to attempt to rebut Los Angeles' *prima facie* showing of a substantial government interest. 535 U.S. at 438-439, 453. On remand here, however, and in direct conflict with *Alameda Books*, the courts below expressly *prohibited* petitioners – who were then procedurally in the same posture as the *Alameda Books* plaintiffs – from attempting to rebut Houston's *prima facie* showing of substantial governmental interest.[37]

The denial of this rebuttal opportunity also conflicts with the approach taken in at least one other circuit interpreting *Alameda Books*. *See, e.g.*, the

---

[36] As Justice Kennedy noted in his *Alameda Books* concurrence:

> "It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech." 535 U.S. at 450.

Even if the court of appeals' decision had justified the Ordinance on the theory that it was effective in reducing secondary effects, the only such "effectiveness" would have been by the outright elimination of adult businesses. Thus, any such alternative rationale for the court of appeals' decision would have been no less in conflict with *Alameda*.

[37] *See* App. 72, 68-70 and 647 ("Issue No. 2").

analyses of this point by both the majority and concurring opinions in *Abilene Retail v. Dickenson County*, 492 F.3d 1164 (10th Cir. 2007).

II. Conflicting with the First Amendment principles this Court recognized in both *Alameda Books* and *Renton*, the Fifth Circuit's decision guarantees significant damage to petitioners' and *the public's* First Amendment rights in Houston, and threatens the public's rights throughout the country if the practice of repeated amending of adult zoning ordinances to eliminate most adult businesses is allowed to stand.

Question Two asks whether a city may, through a pattern of successive adult zoning laws, *repeatedly* change the permissible locations for adult businesses, and, each time, apply the new law to eliminate the overwhelming majority of lawful, pre-existing adult businesses. For purposes of this question, petitioners assume, *arguendo*, the validity of the district court's determination that adequate justification exists for at least *some* of the amendments.[38]

Houston passed the originally challenged restrictions in 1983 and 1986, eliminating numerous businesses when doing so, including the 23 plaintiffs

---

[38] E.g., the addition of "public parks" as sensitive uses, and the revised scheme for calculating residential density by giving far greater weight to "multifamily tracts" (App. 612).

in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988). It then amended these regulations in 1997 to eliminate the overwhelming majority of businesses that were established in reliance on the locational restrictions upheld in *SDJ*. In principle, if the current forced terminations are permissible, no First Amendment constraint would limit endless future such amendments and terminations. Thus, this Question asks whether there is any effective First Amendment barrier preventing cities, regardless of intent, from repeatedly changing their adult zoning laws and knowingly eliminating most adult businesses with each such change. It asks whether the First Amendment essentially prohibits cities from using adult zoning ordinances as impermissible "swords" to eliminate adult businesses rather than as legitimate "shields" to insulate the public from adverse secondary effects.

This Question, though quite important, is also very narrow. Petitioners do not challenge, on First Amendment grounds, a city's right to apply expansions of existing adult zoning regulations to *new* businesses. Neither do they assert that lawful pre-existing businesses can *never* be forced to terminate under any circumstances.[39] Petitioners' "reasonable opportunity" challenge is only to Houston's *pattern* of *repeatedly* using adult zoning laws to force the

---

[39] For example, this petition does not address the circumstance where a city enacts its first adult zoning ordinance, and provides a *reasonable* amortization period for pre-existing businesses.

elimination of large numbers, if not the *overwhelming majority*, of existing lawful businesses.

In short, regardless of whether a city can establish an adequate justification, Question Two raises the inherent chilling effect of successive adult zoning amendments, each of which is enacted with knowledge that it will eliminate the vast majority of adult businesses.

Petitioners believe that the court of appeals' decision upholding this pattern of legislation conflicts with the "reasonable opportunity to open and operate" an adult business guaranteed by *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986). It also appears to conflict in principle with Justice Kennedy's observation, concurring in *Alameda Books*, that a proper analysis of such an ordinance must take into account "how speech will fare." 535 U.S. at 449-450 (Kennedy, J., concurring).

Finally, the decisions below ignore this Court's concern with the *public's* access to expression when courts analyze whether, under *Renton*, an adult zoning ordinance provides a "reasonable opportunity to open and operate." 475 U.S. at 54.

Legislation repeatedly eradicating adult outlets, as approved by the Fifth Circuit, would chill reasonable business people from attempting to relocate and start over, regardless of whether this effect can be proven to have been the "predominate intent" of the

City Council.[40] Even if each successive devastating amendment allows an *abundance* of theoretically "available" alternative sites, fewer and fewer owners will attempt to relocate. The net effect will inevitably be significantly reduced access of the *public* to constitutionally protected expression.[41] Because the threat to the public's access to expression is so severe under this type of legislation, there is an urgent need for this Court to address this issue now. If the court of appeals' ruling is allowed to stand, many jurisdictions throughout the country will be motivated to follow Houston's lead, making a quick end run around First Amendment protections and permanently reducing the public's access to adult entertainment businesses.

---

[40] *Renton* held that an improper legislative intent in enacting an adult zoning law will not invalidate such a law absent clear proof that the improper motivation formed the "predominate intent" underlying the enactment. 475 U.S. at 47-48.

[41] The concurring opinions of both Justice Powell in *Young* and Justice Kennedy in *Alameda Books* (both representing votes necessary to form a judgment) emphasized that the *public's* access to these businesses is of primary First Amendment importance. 427 U.S. at 77 (Powell, J., concurring) ("the central First Amendment concern remains the need to maintain free access of the public to the expression"), and 535 U.S. at 449-450 (Kennedy, J., concurring) (what matters is "how speech will fare"; an adult zoning regulation must "leav[e] the quantity and accessibility of speech substantially intact."). While *Renton* analyzed the impact of such ordinances on an individual adult business, it did not *expressly* address the impact of such ordinances on the public's access to expression.

III. The Fifth Circuit's decision below stands alone in direct conflict with published decisions of the Seventh and Eighth Circuits and the Georgia Supreme Court, regarding the validity of severe restrictions on the content of signs for adult businesses.

Question Three is unrelated to the zoning issues; it asks whether municipalities may severely restrain the content of truthful inoffensive expression contained in the signage of adult entertainment businesses. Houston limits exterior signage on the premises of an adult business to only two signs (called "primary" and "secondary" signs). *Neither* sign may provide anything more than the business' name and a two-word, ordinance-prescribed phrase identifying the type of adult business (H.C.O. § 28-130(c) and (f); App. 614-616). The Ordinance prohibits signs as innocuous as those showing hours of operation, proclaiming free or valet parking, or the weekly dinner special. The Fifth Circuit stands alone in approving such a law, in conflict with at least three jurisdictions: two other federal circuits and the Georgia Supreme Court.

This issue should be addressed to resolve a *direct* conflict between the Fifth Circuit's published decision and published decisions of the Seventh and Eighth Circuits, invalidating very similar restrictions of on-premises adult business signage. In *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1002 (7th Cir. 2002), the court of appeals invalidated a provision

restricting adult business signage to "only the legal name of the enterprise," concluding that such a restriction burdened substantially more speech than necessary and therefore violated this Court's holding in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

Similarly, in *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 843-844 (8th Cir. 2006), the Eighth Circuit relied on the commercial speech test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), to invalidate restrictions limiting to two the number of on-premises signs permitted an adult business within a mile of any state highway, and which further limited the contents of the two signs to only the name of the business and the fact that it excluded minors.

This Court's decision would also resolve a conflict in principle with the Supreme Court of Georgia, which applied *Central Hudson's* commercial speech test to strike down a ban on all *off-site* signage advertising adult businesses in *State v. Cafe Erotica*, 270 Ga. 97, 507 S.E.2d 732 (1998).

Finally, this Court's decision would also resolve a clear conflict with an earlier adult business signage decision of the Fifth Circuit *itself* in *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994), applying *Central Hudson* to invalidate an ordinance prohibiting adult businesses from having any sign describing themselves as a "Gentlemen's Club."

More generally, the Fifth Circuit's published decision herein clearly conflicts with all of this Court's recent decisions articulating the First Amendment standards governing challenges to restrictions of truthful commercial speech, which reaffirm the continuing vitality of *Central Hudson's* four part commercial speech test. *See, e.g., Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Under *Central Hudson*, a restriction on commercial expression violates the First Amendment if it is, *inter alia*, more extensive than necessary to serve the asserted governmental interest. Clearly a complete ban of virtually *all* possible content of adult business signage would appear to be more extensive than necessary to serve any legitimate governmental interest, as every other court to have addressed this question has held.

CONCLUSION

For the foregoing reasons, this Court is urged to issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON

WESTON, GARROU, DEWITT & WALTERS

Attorneys for Petitioners

**Counsel of Record*